

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

MERCHANTS PACKING CO., a corpora-
tion,

Appellant,

v.

NAT ROGAN, Individually and as Col-
lector of Internal Revenue for the Sixth
District of California, and E. H. COHEE,
Individually and as Acting Collector of
Internal Revenue for the Sixth District
of California,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES OF
AMERICA, IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, CENTRAL DIVISION

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

Opinions Below

The only previous opinions in the present case are those of the District Court of the United States for the Southern District of California, Central Division, rendered July 27, 1935, in *The Luer Packing Company v. Nat Rogan, Collector* (R. 26), but not yet reported, and adopted as the opinion in this case (R. 29), entered upon the granting of appellant's application for preliminary injunction herein, and the opinion of said court rendered August 30, 1935 (R. 42), but not yet reported, upon

granting appellees' motion to vacate said preliminary injunction.

Jurisdiction

This appeal involves excise taxes imposed by the Agricultural Adjustment Act, as amended, upon the processing of hogs, and is taken from an interlocutory order and decree of the District Court granting appellees' motion to vacate the preliminary injunction which was entered August 30, 1935. (R. 42.) The appeal is brought to this Court by petition for appeal on behalf of the appellant filed September 13, 1935 (R. 52-53), pursuant to Section 129 of the *Judicial Code*, as amended by the Act of February 13, 1925.

Questions Presented

1. Whether this suit is prohibited by Section 3224 of the *Revised Statutes*.
2. Whether this suit may be maintained where the appellant has a plain, adequate, and complete remedy at law.
3. Whether the bill presents a substantial question on the merits.

Statutes Involved

The applicable provisions of the statutes involved will be found in Appendices A and B in the brief for appellee in the case of *Standard Packing Company v. Nat Rogan, Collector*, No. 7981, now pending before this Court.

Statement

This suit was commenced in the District Court for the Southern District of California, Central Division, on

July 3, 1935, by the Merchants Packing Company, a corporation, as plaintiff, against Nat Rogan, individually and as Collector of Internal Revenue for the Sixth District of California, E. H. Cohee, individually and as acting Collector of Internal Revenue for the Sixth District of California, and Guy T. Helvering, Commissioner of Internal Revenue, as defendants. (R. 3, 21.) From the bill of complaint (R. 3-21), the amendment thereto (R. 34), the second amendment thereto (R. 35-37), and the supplemental complaint (R. 44-48), it appears that appellant is a California corporation with its principal offices and place of business at Los Angeles in said State, where it is engaged in the business of processing hogs within the purview of the Agricultural Adjustment Act (R. 3-4). The appellee Nat Rogan is United States Collector of Internal Revenue at Los Angeles, California. (R. 4.) The appellee E. H. Cohee is described in the bill as acting Collector of Internal Revenue at Los Angeles, California. (R. 4.)

At the time of filing the bill of complaint, processing taxes were about to be assessed against appellant with respect to the processing by it of hogs during the month of May, 1935, in the amount of \$2,934.16, which became due and payable under the terms of the Agricultural Adjustment Act, as amended, on or before June 30, 1935. (R. 15-16.)

Appellant avers that it was without an adequate remedy at law because it could not file a claim for refund after payment of such taxes, and in the event of the rejection thereof, to file suit for the refund of such taxes,

for the reason that a judgment obtained thereon would be of no force or effect in that the Congress had made no appropriation for the payment of any such refunds. Appellant avers that unless such tax is paid when due, it will become liable to the imposition of heavy penalties. (R. 16.) The bill prays for preliminary and thereafter permanent injunction against the appellees, restraining them from collecting or attempting to collect in any manner said taxes from appellant and for declaratory judgment. (R. 19-20.)

As a basis for such injunctive relief, the bill charges that the Agricultural Adjustment Act, as amended, is unconstitutional and the taxes imposed thereunder are illegal for reasons not here material (R. 11-15); that there was a threat of removal of appellant's remedy at law to litigate the validity of such tax and the constitutionality of said Act because there was pending before the Congress a bill amendatory of the Agricultural Adjustment Act which purported to deny to a processor the right to bring suit for the refund of processing taxes in the event that said Act should be declared unconstitutional; that neither of the appellees could respond to a judgment against him for the wrongful collection of the taxes sought to be enjoined in the event said Act should be declared unconstitutional or void; that unless restrained and enjoined from the collection of such taxes, the appellees will file liens against the property of appellant which would result in destroying the value of appellant's property and business and would prevent it from selling any of its inventory; that unless such taxes are paid, the appel-

lees will attempt to collect the same by distraint, causing appellant to suffer irreparable damage, and that appellant will have no way or manner within which to recoup its losses or damages; and that there will be danger of a multiplicity of suits (R. 17-19).

From the bill of complaint, appellant moved for preliminary injunction, which motion was sustained on August 9, 1935. (R. 30-33.) Prior to the hearing on the motion for preliminary injunction, appellees filed a motion to dismiss the bill of complaint (R. 22-23), which motion was denied (R. 29).

Subsequent to the granting of the preliminary injunction herein, appellant filed a second amendment to its complaint on September 6, 1935, in which it is recited that since the assessing and levying of processing taxes against it, appellant's profit from its business has been diminishing until such business actually showed an operating loss. Appellant charges that such loss is directly attributable to the assessment, levy and collection of said processing tax. (R. 35-37.)

Under date of August 22, 1935, appellee Nat Rogan filed his motion to vacate the injunction theretofore granted in said cause (R. 39-41), which motion was sustained on August 30, 1935 (R. 42-43). This appeal is from the interlocutory decree sustaining appellee's motion to vacate the preliminary injunction. (R. 52-56.)

Subsequent to the entry of the order sustaining appellee's motion to dissolve said injunction, appellant filed its supplemental complaint (R. 44-48), which pleads the enactment of amendments to the Agricultural Adjustment

Act which became effective August 24, 1935, and charges that said amendments have taken away from appellant all remedy at law for the recovery of processing taxes, and that such amendments are void, invalid and unconstitutional, upon the grounds set forth in the original bill of complaint as to the validity and unconstitutionality of the Act prior to the amendment. The supplemental bill further avers that additional processing taxes for succeeding months, including the month of August, 1935, have accrued, become due and payable, and that appellant's property is liable to distraint and seizure unless such taxes are paid. (R. 47.) An injunction pending appeal has been granted by this Court.

Argument

This appeal involves the identical questions that are presented in the appeal of *Standard Packing Company v. Nat Rogan, Collector*, No. 7981, now pending before this Court. The appellee's position is fully presented in the brief for the appellee filed in that case. It will, therefore, not be repeated here but is included herein by reference. Accordingly, copies of appellee's brief in that appeal are served herewith upon counsel for the appellant.

Conclusion

For the reasons stated in the brief for appellee in the appeal of *Standard Packing Company v. Nat Rogan, Collector*, No. 7981, it is urged that the court below correctly denied appellant's motion for preliminary injunction. Because the court below is without jurisdiction to restrain

or enjoin the collection of the taxes described in the bill, or to hear and/or determine the issues presented by said bill of complaint, it is urged that this case be remanded to the District Court with instructions to dismiss the bill.

Respectfully submitted,

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November, 1935.

